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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ALFONSO ESTUDILLO,

Defendant and Appellant.

G039632

(Super. Ct. No. 05CF3817)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and David Delgado-Rucci, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Luis Alfonso Estudillo of murder (Penal Code section 187, subdivision (a)); all further statutory references are to this code), found true that he vicariously discharged a firearm causing death (§ 12022.53, subds. (d), (e)(1)) and committed the crime for the benefit of, at the direction of, or in the association with a criminal street gang (§ 186.22, subd. (b)(1)). The court sentenced him to 25 years to life for the murder conviction plus 25 years to life for the firearm finding. He appeals from the latter portion of the sentence.

The sole issue in this appeal is whether section 12022.53, subdivisions (d) and (e)(1) applies to a defendant who was found to have vicariously discharged a firearm. It does and we therefore affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Defendant drove two fellow members of the K.P.C. street gang into the territory of the Logan street gang's territory. When there, they encountered Efren Enriquez and Erick Peralta, who were walking towards a store. At least one of them was a member of a rival gang. Defendant stopped his car while his two passengers alit and approached the two pedestrians. After asking where Enriquez and Peralta were from, the K.P.C. members yelled out their gang name and one of them shot Peralta, killing him. They then ran back to defendant's car and the three fled the scene.

The jury was instructed on two alternative theories on which defendant's vicarious firearm discharge charge could be based; the jury was not asked to determine which of these bases it found to be true. One theory was that defendant aided and abetted the murder. The other instructed the jury that they might find defendant guilty of murder if it was a natural and probable consequence of a conspiracy to disturb the peace. The conspiracy was not a charged offense. In closing argument, the prosecutor told the jury that it might find defendant was a member of a conspiracy to disturb the peace. In its

verdict, the jury found “it to be true that the defendant vicariously discharged a firearm causing death to the victim, within the meaning of Penal Code Section 12022.53 [, subdivisions] (d) and (e) (1).”

DISCUSSION

The relevant portion of section 12022.53, subdivision (d) provides: “any person who, in the commission of a felony specified in subdivision (a), . . . [including section 187] . . . , personally and intentionally discharges a firearm and proximately causes . . . death[] to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.” The relevant portion of section 12022.53, subdivision (e)(1) states: “The enhancements provided in this section shall apply to any person who is a *principal* in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22 [benefit of criminal street gang]. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).” (Italics added.) Subdivisions (b), (c), and (d) of section 12022.53 relate to the use of a firearm, discharge of a firearm, and discharge of a firearm coupled with great bodily injury or death respectively.

Defendant argues that, because the jury may have concluded liability for the vicarious discharge of the firearm was based upon his membership in a conspiracy to disturb the peace, his 25-years-to-life sentence under section 12022.53, subdivisions (d) and (e)(1) must be reversed. He contends that his liability as a co-conspirator would not qualify him as a “principal,” a requirement for the imposition of the sentence.

Here is the gist of defendant’s argument: “For purposes of the firearm enhancement in section 12022.53, subdivision (e), a ‘principal in the commission of an offense’ encompasses only one who directly commits an offense specified in the statute

or aids and abets its commission; the term ‘principal’ does not include one whose guilt is based on vicarious liability under the natural and probable consequences doctrine[.]” (Underscoring omitted.) Defendant acknowledges there is no authority for this proposition. The issue thus becomes, can one who is guilty of murder based on the natural and probable consequence of a conspiracy to disturb the peace be considered to be a “principal in the commission of an offense” as that phrase is used in section 12022.53, subdivision (e)(1)?

Defendant relies on the definition contained in section 31. As relevant here the statute provides: “All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed.” He argues, that under this definition, defendants can only be “principals” if they “directly commit” the crime, “aid and abet in its commission,” or “advised and encouraged its commission.” Therefore, he argues, one who is guilty under the natural and probable consequences doctrine does not fit the section 31 definition.

But the conspiracy instruction was given as a potential basis for finding defendant guilty of aiding and abetting the murder. The use of the instruction in a case such as this is explained in *People v. Durham* (1969) 70 Cal.2d 171 (*Durham*). In that case, Durham and Robinson engaged in a cross-country crime spree that included at least two armed robberies. During a vehicle stop, police officers ordered the defendants out of their car. Robinson pulled out a gun, shooting and killing an officer. Meanwhile, Durham remained on one knee, generally obeying a second officer’s commands to keep his hands raised over his head. Both defendants were charged with and convicted of the officer’s murder.

On appeal, Durham challenged the sufficiency of the evidence supporting his conviction “‘under either of the two theories of conspiracy and aiding and abetting

advanced by the prosecution.”” (*Durham, supra*, 70 Cal.2d at p. 179.) He argued “(1) that the evidence is insufficient to convict him under the prosecution’s ‘conspiracy theory’ because any conspiracy to rob had terminated prior to [the time of the shooting] and there is no substantial evidence to show a conspiracy to resist arrest . . .; and (2) that the evidence is insufficient to convict him under the prosecution’s ‘aiding and abetting theory’ because the only evidence introduced in support of this theory is that . . . Durham lowered his hands after [an officer] had ordered him to keep them raised after the shooting—and this last item of evidence is not sufficient to support a finding that he aided and abetted in the commission of the crime.” (*Id.* at pp. 179-180, fn. omitted.)

The Supreme Court affirmed his conviction concluding “[t]he difficulty [with Durham’s argument] is that the prosecution’s theory of the case cannot be split into such fragments.” (*Durham, supra*, 70 Cal.2d at p. 180.) First, it noted “the defendants were not charged with the crime of conspiracy; they were charged with murder. Durham was found guilty of that charged crime as a principal. . . . [¶] It is true that in presenting its case the prosecution had recourse to the principles of conspiracy. However, this thesis, far from seeking to establish a basis of criminal liability separate and apart from that of aiding and abetting, was pursued for the purpose of demonstrating Durham’s intimate involvement in the continuing criminal enterprise which culminated in the shooting of Officer Du Puis. [¶] . . . [¶] In the instant case the prosecution, in support of its sole theory of guilt as to Durham, sought to show that he ‘instigated or advised the commission of the crime’ in that he was a party to a compact of criminal conduct which included within its scope the forcible resistance of arrest *and that he was also* ‘present for the purposes of assisting in its commission’ in that his conduct at the scene of the incident, viewed in its totality, was wholly consistent with such purposes.” (*Id.* at pp. 180-181, fns. omitted.)

The manner in which the conspiracy count was used in *Durham*, as well as in the present case, is further explained in a footnote to part of the above quotation:

“Conspiracy principles are often properly utilized in cases wherein the crime of conspiracy is not charged in the indictment or information. . . . [T]he prosecution properly seeks to show through the existence of conspiracy that a defendant who was not the direct perpetrator of the criminal offense charged aided and abetted in its commission. [Citations.]” (*Durham, supra*, 70 Cal.2d at p. 181, fn. 7.)

Finally, *Durham* concluded: “In view of the evidence in the instant case which we have outlined above the jury could reasonably have found that defendants . . . had been engaged in a joint expedition which involved the commission of robberies . . . and which included among its purposes the forcible resistance to arrest; that Durham was fully aware of the fact that Robinson both had exhibited his pistol in the commission of said robberies and had actually fired it at one who had sought to apprehend them in the act of escaping; . . . that Durham knew that Robinson was armed when they emerged from the car; and that in the totality of circumstances Robinson’s act was, and was known by Durham to be, a reasonable and probable consequence of the continuing course of action undertaken by the defendants. *The finding of such facts would be sufficient to support the finding of Durham’s guilt as an aider and abettor under the principles we have above set forth.*” (*Durham, supra*, 70 Cal.2d at p. 185, fn. omitted, italics added.)

The analysis employed to support the murder conviction in *Durham* applies to defendant herein as well. In *Durham*, the prosecution presented evidence the defendants engaged in a conspiracy to commit robberies. The police officer’s murder did not occur during the commission of a robbery, but the Supreme Court recognized that, under the natural and probable consequences doctrine, the defendants’ “compact of criminal conduct . . . included within its scope the forcible resistance of arrest” (*Durham, supra*, 70 Cal.2d at p. 181.) Here the prosecution charged defendant with murder, in part arguing he conspired to commit a breach of the peace and that, under the circumstances, murder was the natural and probable consequence of that conspiracy. In

short, defendant was found guilty, not as a co-conspirator, but rather “as an aider and abettor.” (*Id.* at p. 185.) “[T]his is not a prosecution for conspiracy, the existence of the conspiracy showing only that appellant aided and abetted the commission of the crime.” (*People v. Lapierre* (1928) 205 Cal. 470, 471.) Since defendant is guilty of murder as an aider and abettor, he was a principal in the commission of that offense under section 31. Consequently, he is subject to the section 12022.53 gun enhancement.

The result is not affected by the fact that the conspiracy on which the jury was instructed was a conspiracy to commit a misdemeanor. In *People v. Caesar* (2008) 167 Cal.App.4th 1050, 1056-1057, 1059, the court affirmed an attempted murder conviction based on the defendant’s aiding and abetting an assault and battery. In *People v. Gonzales* (2001) 87 Cal.App.4th 1, a case factually similar to the present one, the court affirmed murder convictions where defendants alighted from a car to fight rival gang members and one of the defendants then fatally shot one of them. The court stated, “This is sufficient evidence from which the jury could conclude that it was reasonably foreseeable when the three defendants left the car that a fatal shooting would be the natural and probable consequence of the fight between the groups of young men.” (*Id.* at p. 10.)

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.